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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. THOMAS MORGON, Defendant and Appellant.	B204856 (Los Angeles County Super. Ct. Nos. NA073081, NA074069)

APPEAL from a Judgment of the Superior Court of Los Angeles County. Jesse I. Rodriguez, Judge. Affirmed.

Patrick Morgan Ford, under appointment by the Court Of Appeal for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Thomas Morgon appeals his conviction of 14 counts of forgery (Pen. Code, § 470, subd. (d)), two counts of possession of a forged check (Pen. Code, § 475, subds. (c), (d)), and one count of burglary (Pen. Code, § 459.)[1] He contends the trial court erred in (1) failing to grant his motion for judgment of acquittal; (2) failing to conduct a hearing on his *Marsden* motion; and (3) denying him probation. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Prosecution Case.

1. Bruce Martin.

Bruce Martin is the owner of four California-based businesses, as well as several out-of-state businesses. All of the businesses communicate with each other using a computer wide-area network. During the summer of 2006, he hired defendant to manage this computer network. Defendant worked late at night and was often alone in the office. Defendant brought several people in to help him work on the network; one of them was Thomas Galaz, whom defendant paid out of his own pocket. Defendant worked for Martin from July 2006 to early September 2006.

Defendant had access to all of Martin's files on his computer network, including bank accounts and records for all of Martin's companies. After Martin discovered defendant had been putting Martin's passwords in emails, Martin told defendant that neither he nor his employees were permitted to use Martin's passwords.

Other than Martin's wife Carolyn Costin, the only person who had authority to sign checks on his personal bank account was Freda Kurtz. Martin had his employees prepare his checks for his signature. He kept blank checks for his personal account at the business location where defendant worked. He did not pay defendant from this account.

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[1] All statutory references herein, unless otherwise noted, are to the Penal Code.

Martin testified concerning 12 checks written on his personal and business accounts that he did not sign or authorize anyone to prepare (counts 9 through 20).[2]

Judith Slosser worked for Martin in design and development as a bookkeeper and administrative assistant. In that capacity, she wrote checks, kept track of bills, and did clerical work. No one else wrote checks; Slosser was not a signatory on Martin's accounts.

Slosser prepared the checks to pay defendant, who was an independent contractor. Most of the time she paid defendant "right on the spot." The checks Martin used were computer-generated checks printed on paper, and were kept in a drawer under her desk in the office she shared with Martin. She testified that when Martin would instruct her to pay defendant, she would take a check out of the drawer, run the check through the computer, and hand it to Martin to sign. Defendant would be in the office watching the whole procedure.

When some of the checks named in counts 9 through 20 were returned for payment, Slosser noticed they were written on accounts normally not used to pay employees, were not the style of check that Martin used, or contained account numbers that did not belong to any of Martin's businesses. Each of check Nos. 8127 through 8133 did not contain Martin's account number, listed the name "Brentwood Eating Disorder Center," which was not the name of Martin's company, and contained an incorrect address.

2. Xpress Satellite.

Andrew Whallon testified as the owner of Xpress Satellite, a retailer for Dish Network and Direct TV. Defendant worked for him when Whallon was starting his business, and developed all of his programming. Defendant was very proficient technically,

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[2] Counts 9 through 20 charged violations of section 470, subdivision (d) relating to checks passed as being from Martin or one of his companies. The checks were numbered as follows: count 9, No. 9758; count 10, check No. 4621; count 11, check No. 2578; count 12, check No. 5671; count 13, check No. 8125; count 14, check No. 8127; count 15, check No. 8128; count 16, check No. 8129; count 17, check No. 8130; count 18, check No. 8131; count 19, check No. 8132; and count 20, check No. 8133.

not just in computers but in all areas of electronics. Whallon did not directly hire Galaz, but "he came with [defendant]."

Defendant had three or four people who worked for him. Whallon authorized defendant to pay them; sometimes, Whallon would print the checks and other times defendant would print the checks. Defendant worked during normal business hours and had keys to Whallon's business. Sometime in March 2006 Whallon believed Galaz had done something dishonest, and he did not want him around. Both defendant and Galaz had access to Whallon's computers.

Whallon sometimes wrote checks himself, or he would have defendant write them using Quickbooks. Defendant had his permission to write checks and enter them in Quickbooks; he would present the checks to Whallon for his signature. Whallon identified check No. 3458 (count 1) and check No. 3471 (count 5) as Satellite Xpress checks that contained his account number on them and his business address, but at the time they were written, defendant was no longer working for him.[3] Whallon testified that the writing on these two checks appeared to be Galaz's writing.

3. Amigos Check Cashing.

Maria Lopez worked as a cashier at Amigos Check Cashing in Long Beach. Defendant was a customer, whom she sometimes saw with Galaz. On occasion, defendant would call Lopez, and send Galaz in with defendant's driver's license to cash a check. Defendant cashed checks purportedly from Martin's companies on September 25, 2006, October 5, 2006, October 11, 2006, and October 16, 2006.

On October 26, 2005, defendant sent Galaz in to cash a group of checks. Galaz tried to leave Lopez $200, telling her that defendant had told him to do so. She understood the money was some kind of a tip, which seemed "weird" to her. That was the last time she saw Galaz Two of the checks had Galaz's signature on them, although they were presented with defendant's driver's license.

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[3] Counts 1 and 5 charged violations of section 470, subdivision (d).

4. Money Mart Check Cashing.

Cheryl Hinkle worked for Money Mart Check Cashing in Long Beach. The business keeps a check cashing history for a several month period. On a first visit Hinkle would take the customer's address and employment information, copy their identification, and take a thumbprint.

On November 29, 2006, Galaz presented a check that raised her suspicions because it was a payroll check from the same company on which Galaz had cashed a check a few days earlier.[4] Galaz presented one of Xpress Satellite's checks to Money Mart on November 27, 2006, and another on November 29, 2006. When Galaz presented the second check, Hinkle called Xpress Satellite to verify the check. The person she spoke to told her that they had not issued any check to Galaz, and he was no longer their employee. She described both defendant and Galaz to the person at Xpress Satellite on the telephone, who recognized both of them. Defendant entered the store briefly, and she was under the impression he was Galaz's supervisor. Defendant did not attempt to cash any checks, and she could not remember if she had seen him before, although he had a check cashing card with Money Mart.

William Foster, a Long Beach police officer, responded to a 911 call of forgery to the Money Mart on Long Beach Boulevard in Long Beach on November 29, 2006. Defendant was seated in a van in a parking lot in front of the business. Defendant consented to a search of the van, which yielded two black suitcases. One suitcase contained a laptop computer and blank check stock consisting of between 50 and 90 sheets. Galaz was inside the Money Mart. No fingerprint analysis was done on the suitcases.

Michael Hutchinson, a detective with the Long Beach police department, worked in computer forensics. Defendant's computer contained software programs for producing

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[4] Counts 6, 7 and 8 alleged violations of sections 475, subdivision (c), 459, and 475, subdivision (b), respectively, arising from the November 29, 2006 incident at the Money Mart and which related to defendant's possession of forged and blank checks and his entry into the Money Mart to facilitate Galaz's negotiation of the checks. Counts 2, 3, and 4 were dismissed prior to trial.

checks, including the name and account number. The software had information for Xpress Satellite and defendant's resume.

Russell Bradford, an expert document examiner, testified for the defense that in his opinion, none of the checks were endorsed by defendant, but check Nos. 8125, 8127, and 8129 were endorsed by Galaz. Bradford could not determine who signed several of the checks as payor. He had defendant sign his own name and Galaz's name as an exemplar, but did not have Galaz provide any exemplars.

B. Defense Case.

Thomas Galaz, who had entered a plea of guilty, testified for the defense that he had known defendant for eight years. On November 29, 2006, Galaz took a check he printed out on the computer to Money Mart to cash. At the time he was living in a motel and trying to cash more checks so he could go to Mexico. The two suitcases in defendant's van contained his clothing, his laptop computer, a printer, blank checks, some music CDs and his plane tickets. He attempted to cash two checks purportedly on Whallon's account that day, one payable to himself and one payable to defendant. Defendant waited in the van outside while Galaz went into the store.

They usually used Amigos Check Cashing for their Xpress Satellite checks because they had established a relationship with the cashier. Galaz admitted signing check No. 9758 from Martin's business, and stealing and endorsing check No. 4621 from Martin's business. He signed and endorsed the remaining checks. Galaz used two computers to print the false checks, and testified he took the checks from Martin's office.

Defendant testified that he had cashed checks at Amigos for approximately five years. He met Galaz through a friend. Defendant denied stealing confidential information from Martin. Defendant explained that he believed Martin's passwords needed to be changed, and emailed Martin and his location supervisors about the need for the change. He was unaware that the supervisors were not supposed to have this information. Defendant denied asking Galaz to cash his checks for him at Amigos Check Cashing, and contended the computer found in his van was not his.

C. Rebuttal Case.

In rebuttal, Officer Diego Escutia testified for the prosecution that Galaz told him at the time of his arrest that defendant forged checks on the computer. Galaz received a percentage from one of the checks cashed several days before their arrest. Galaz told the officer the computer in the van belonged to defendant.

The jury found defendant guilty on Counts 1 and 5 through 20. The court sentenced defendant to the upper term on count 1, the middle term on the remaining counts to be served consecutively, for a total of 13 years, stayed sentencing on count 7 pursuant to section 654, and ordered defendant to pay restitution to the victims.

DISCUSSION

I. MOTION TO DISMISS.

A. Factual Background.

After the presentation of the prosecution's case, defendant moved for a judgment of acquittal pursuant to section 1118.1 and to dismiss pursuant to section1385. His primary argument was that there was no evidence connecting him to Martin's checks. Defendant further argued that Martin had suffered no loss from the bad checks written on his business because they did not contain the correct account number, nor was there any evidence that defendant attempted to cash the checks. Finally, there was no evidence his signature was on them, and there was no reference to them or any kind of notation on his computer. The court denied the motions.

B. Discussion.

"The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, 'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.'" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) We limit our consideration to the prosecution's evidence in evaluating a motion for judgment of acquittal. (*People v. Cole* (2004) 33 Cal.4th 1158, 1213.)

Although here defendant particularly referenced certain checks in making his motion, we treat his motion as a generalized motion objecting to the sufficiency of the evidence on all counts.

Counts 9 through 20 – Bruce Martin. (Section 470, Subdivision (d).)

Forgery is committed when a person, with the intent to defraud, knowing that he or she has no authority to do so, forges, passes or attempts to pass a forged check. (§ 470, subd. (d).) Section 470, subdivision (d) provides that "Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, . . ." Forgery thus has three elements: a writing, the false making of the writing, and an intent to defraud. (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741.) The false writing must have the effect of defrauding one who acts upon it as if it were genuine. (*Id.* at p. 742.)

Defendant relies on the testimony of Maria Lopez in support of his argument, and disputes that he passed bad checks. He contends Lopez testified that she only saw him in the market occasionally, only twice cashed legitimate checks for him, and never testified that she cashed fraudulent checks for him.

Defendant's argument ignores the fact that the jury was instructed on aiding and abetting consistent with the holding of *People v. Beeman* (1984) 35 Cal.3d 547, 561, that they could find defendant guilty of a crime if he aided the commission of a crime, with knowledge of the perpetrator's purpose, and with the intent or purpose of committing or facilitating the commission of the crime. "[T]he doctrine . . . that one may be liable as an aider and abettor . . . '"snares all who intentionally contribute to the accomplishment of a crime in the net of criminal liability defined by the crime, even though the actor does not personally engage in all of the elements of the crime."'" (*People v. Morante* (1999) 20 Cal.4th 403, 433.)

Here, there was substantial evidence that defendant either cashed the checks himself or aided and abetted Galaz in passing the bad checks involved in counts 9 through 20 that had been created using Martin's business and financial information. Defendant drove to the

location on each instance, and either cashed the check himself or sent Galaz in to cash the check. This evidence supports a conclusion that he had knowledge that Galaz intended to pass the checks as genuine and intended to facilitate that crime though the use of his driver's license, his calling ahead, and his entry into the Money Mart to lend an air of legitimacy to the transaction.

Counts 1 and 5 - Xpress Satellite. (Sections 470, subdivision (d).)

Count 1 involved the passing of forged Xpress Satellite check No. 3458 on November 27, 2006 at the Money Mart in violation of section 470, subdivision (d). Defendant contends there was no evidence supporting this count because there were no facts establishing his involvement in the passing of this check. Although there is no evidence defendant was present at the Money Mart on November 27, 2006 when Galaz cashed the check and Whallon testified the writing on check No. 3458 appeared to be Galaz's writing, there is other evidence tying defendant to the commission of this offense. Defendant had access to Whallon's checks and other financial information; both defendant and Galaz were arrested while in possession of computers containing purloined financial information and blank checks; and defendant had a check cashing card with Money Mart. These facts support an inference that defendant participated in the preparation and passing of check No. 3458.

Count 5 involved the passing of forged Xpress Satellite check No. 3471 on November 29, 2006 at the Money Mart in violation of section 470, subdivision (d). Defendant argues that there is no evidence supporting this count other than Hinkle's testimony that defendant entered the store, gave her the impression he was Galaz's supervisor at Xpress Satellite, and left the store. On the contrary, as discussed above in connection with counts 9 through 20, there evidence supports an inference that defendant aided and abetted the passing of this check by driving Galaz to the Money Mart, and entering the store to assure Hinkle that Galaz's actions were legitimate by posing as Galaz's supervisor.

Counts 6 and 8. (Section 475, subdivisions (b), (c).)

Count 6 involved defendant's possession of a completed, forged check on November 29, 2006 in violation of section 475, subdivision (c),[5] and count 8 involved defendant's possession of blank checks on the same date in violation of section 475, subdivision (b).[6] Defendant contends there was no evidence he intended to fill out the blank check, or that he intended to pass the completed check (payable to Galaz) with intent to defraud. These contentions are without merit. On count 6, the evidence supports an inference that defendant aided and abetted Galaz in the passing of the fraudulent payroll check by driving Galaz to the Money Mart and entering the store for the purpose of attempting to legitimize the transaction by posing as Galaz's supervisor. On Count 8, the evidence supports an inference that defendant, who was the driver of the van and had previously created bad checks, possessed the blank checks found in the van for the purpose of preparing additional fraudulent checks.[7]

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[5] Section 475, subdivision (c) provides, "Every person who possesses any completed check, money order, traveler's check, warrant or county order, whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery."

[6] Section 475, subdivision (b) provides, "Every person who possesses any blank or unfinished check, note, bank bill, money order, or traveler's check, whether real or fictitious, with the intention of completing the same or the intention of facilitating the completion of the same, in order to defraud any person, is guilty of forgery."

[7] Nonetheless, defendant contends that even if the evidence was sufficient to support these two counts, defendant could only be convicted of a single violation of section 475. (See, e.g., *People v. Bowie* (1975) 72 Cal.App.3d 143, 157 (*Bowie*).) We disagree. In *Bowie*, the defendant was convicted of 11 counts of possessing blank checks under former section 475 (the substantive provisions of which now appear at section 475, subdivision (b)). (*Id.* at p. 156.) On appeal, he contended his motion to consolidate the counts into one count was erroneously denied because the possession of the 11 checks constituted but one violation of the statute. (*Ibid.*) *Bowie* concluded that because the defendant possessed all 11 checks at one time and the statute referred to "any check," the singular included the plural and defendant had committed only one violation of the statute. (*Id.* at pp. 156-157.) Similarly, in *People v. Ryan* (2006) 138 Cal.App.4th 360 (*Ryan*), the court confronted the question of whether different provisions of section 470

Count 7. (Section 459.)

Count 7 involved defendant's entry into the Money Mart to speak with Galaz on November 29, 2006 in violation of section 459.[8] Defendant contends that because there were no facts showing he participated in Galaz's fraudulent transaction, there was no evidence he entered the store to commit a felony. We disagree. Given the surrounding circumstances, the evidence supports an inference defendant entered the market with the intent to commit a felony. Defendant drove to the Money Mart with Galaz, had previously been to the Money Mart to assist Galaz in passing bad checks, and entered the Money Mart purporting to be Galaz's supervisor to facilitate Galaz's passing of the bad check by attempting to legitimize Galaz's behavior.

II. NO ERROR IN CONNECTION WITH A *MARSDEN* MOTION.

Defendant contends the trial court erred in failing to inquire into his motion for a new trial based upon his claim of ineffective assistance of counsel, should have appointed counsel to represent him at the *Marsden* hearing, and erred in refusing a reasonable continuance for him to conduct legal research on his motions.

A. Factual Background.

After the conclusion of trial, but before sentencing, the court noted that defendant had indicated at the last hearing he intended to locate new counsel. Defendant advised the court he had not done so, that he wished to represent himself, and did not want his appointed counsel to continue to represent him. The court took defendant's *Faretta*[9] waiver, and

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could be violated with reference to the same fraudulent instrument, and concluded it could not. (*Id.* at p. 371.) Here, both *Bowie* and *Ryan* are distinguishable because Counts 6 and 8 involved different instruments; in one case, the check was completed; in the other, the checks were blank.

[8] Section 459 provides in relevant part: "Every person who enters any house, room, apartment, tenement, shop, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary. . . ."

[9] *Faretta v. California* (1975) 422 U.S. 806.

advised defendant it intended to sentence him, and that sentencing would not be postponed because defendant was proceeding in propria persona. The court granted defendant's request to represent himself.

Defendant then moved for a new trial, and/or a mistrial on the basis of ineffective assistance; he also made an offer of compromise. Defendant's "Motion to Declare a Mistrial" argued that his counsel had rendered ineffective assistance. Defendant alleged, among other things, that counsel colluded with the District Attorney's office; failed to investigate the case or prepare an adequate defense; and failed to cross-examine the prosecution's witnesses on key points. In addition, he claimed he had advised counsel that he wanted a *Marsden* motion, but that counsel failed to relay his request to the court. After receiving defendant's written motions, the court continued the matter to the afternoon session.

At the continued afternoon session, defendant requested a continuance to conduct further legal research on his motions. The court stated that it was receptive to defendant's request to continue sentencing to permit him to obtain new counsel. In that regard, defendant advised the court that he had been unable to locate a new attorney, and then contended he had received ineffective assistance of counsel because his appointed lawyer failed to call witnesses to testify to his character. Defendant elaborated on his written motion, contending that he was being prosecuted because of a claim he made against Orange County; the prosecution intimidated Maria Lopez into testifying that defendant called ahead to tell her he would be cashing checks, when in fact the owner of the store would testify to the contrary; defendant told his counsel, who did not follow defendant's instructions that he did not want counsel to be his attorney "over and over again." The court denied the motion for a new trial.

B. Discussion.

Under *Marsden*, a defendant is deprived of his or her constitutional right to the effective assistance of counsel when a trial court denies his motion to substitute one appointed counsel for another without giving him an opportunity to state the reasons for his request. (*People v. Ortiz*, (1990) 51 Cal.3d 975 at p. 980, fn. 1.) However, "[a] trial judge

should not be obligated to take steps toward appointing new counsel where defendant does not even seek such relief." (*People v. Gay* (1990) 221 Cal.App.3d 1065, 1070.) "The court's duty to conduct the [*Marsden*] inquiry arises 'only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.'" (*People v. Lara* (2001) 86 Cal.App.4th 139, 151, italics added.) Requests under *Marsden* must be clear and unequivocal. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051, fn. 7.) There must be a "clear indication by defendant that he wants a substitute attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)

Here, the record does not support defendant's assertion that he made a *Marsden* motion to obtain new appointed counsel. Rather, after his *Faretta* motion, defendant sought to obtain a new trial based upon his counsel's deficient performance at trial, and told the court he was in the process of hiring private counsel without success. Nothing in his colloquy with the court indicates that defendant requested new, appointed counsel.

Furthermore, on the merits of defendant's new trial motion, we cannot determine from this record whether counsel's assistance was ineffective. The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-694; see also Cal. Const., art. I, § 15.) To obtain a new trial based upon ineffective assistance of counsel, appellant must show (1) counsel's conduct was deficient when measured against the standards of a reasonably competent attorney, and (2) prejudice resulting from counsel's performance "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 784 [quoting *Strickland v. Washington*].) Prejudice is shown where there is a reasonable probability, but for counsel's errors, that the result of the proceeding would have been different. (*In re Harris* (1993) 5 Cal.4th 813, 833.) "[T]he petitioner must establish 'prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.'" (*In re Clark* (1993) 5 Cal.4th 750, 766.)

"In some cases . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. [Citation.] Otherwise, appellate courts would become engaged 'in the perilous process of second-guessing.'" (*People v. Pope* (1979) 23 Cal.3d 412, 426, fn. omitted.) On appeal, if the record shows a rational tactical purpose behind counsel's act or omission, or if the record does not show counsel's purpose but there could be a satisfactory explanation for the act or omission, the judgment will be affirmed. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582; *People v. Pope, supra*, 23 Cal.3d at pp. 425-426.) Where the record sheds no light on the purpose behind counsel's acts or omissions, the question of ineffective assistance of counsel more appropriately is resolved by a petition for writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Pope, supra*, 23 Cal.3d at p. 426.) Habeas corpus proceedings allow defendant the opportunity to present additional evidence regarding trial counsel's reasons for acting or omitting to act in the manner of which defendant complains. (*Ibid*.) If the evidence establishes a prima facie case for habeas corpus relief, then an order to show cause will issue. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 502.)

Here, nothing in the record supports any contention that defendant would have been entitled to a new trial on the basis of an ineffective assistance of counsel claim. Other than defendant's bare assertions, there was no evidence in the record concerning his claim against Orange County, or why he would be the subject of retaliatory prosecution. Furthermore, there was no evidence in defendant's new trial motion as to defense counsel's decisions which could have shed light on the merits of defendant's contentions that counsel failed to act on defendant's request to replace him, failed to bring to light the prosecution's improper motivations, failed to present testimony on defendant's prior business dealings with the Money Mart, and failed to investigate alleged witness intimidation. Without evidence supporting any of these allegations, we must presume that counsel made reasonable tactical choices, and affirm.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO CONTINUE THE MATTER TO PERMIT DEFENDANT TO ORDER A NEW PROBATION REPORT.

Defendant contends the trial court erred in refusing to grant a continuance because he did not receive his probation report until the date of sentencing, in concluding he was ineligible for probation, and in failing to consider mitigating circumstances in imposing sentence. (§ 1203, subd. (b)(2)(E); *People v. Bohannon* (2000) 82 Cal.App.4th 798, 807.) He further contends his out-of-state felony convictions do not make him ineligible for probation because there was no evidence in the record the offenses would have been felonies in California. (§ 1203, subd. (e)(4).) We find that defendant failed to object to the untimely provision of the report, and that any error was harmless.

A. Factual Background.

After concluding the hearing on defendant's motion for a new trial, the court proceeded to sentencing. Defendant stated he had not seen his probation report. The court advised defendant it would give him a copy of the report, dated July 18, 2007; defendant read the report in the courtroom. Defendant objected to the report, contending it contained inaccuracies because it did not reflect his contact with anyone in the community other than the victims; omitted other mitigating factors, such as the fact he had saved a woman's life after a car accident, he had a brain-damaged son who relied on him for support, and he had numerous ties to the community; and stated that he had not been forthcoming about his out-of-state convictions. Defendant requested a new probation report to take into account his considerable community ties. The court denied defendant's request for a continuance.

The prosecution requested the trial court to sentence the defendant to the high term, based on the lack of mitigating factors and the aggravating factors set forth in the sentencing memorandum that defendant occupied a position of leadership in the commission of the crimes, the manner in which the crimes were carried out indicated planning and sophistication, the crimes involved the taking of a great deal of monetary value (a total of $33,721.76 from all victims) the defendant took advantage of a position of trust or

confidence to commit the crimes, and defendant had consistently attempted to blame others for the crimes.

The court denied probation, stating, "In this case, based on the evidence that have heard before the court, based on all the documents submitted to this court, the court is going to deny probation." The court selected the upper term of three years on count 1, the mid term on the other counts, and sentenced defendant consecutively for a total term of 13 years on all counts. The court stated that it did not find any factors in mitigation, and found the crimes involved sophistication and planning, the actual taking of substantial amounts of money, and the exploitation of a position of trust.

B. Discussion.

Section 1203, subdivision (b)(2)(D) requires the probation report to be made available to the defendant at least five days prior to sentencing.[10] When the defendant has not timely received a probation report, has made a specific objection, and requested a continuance, the failure to follow the requirements of section 1203, subdivision (b)(2)(E) constitutes a denial of due process, requiring remand for resentencing. (*People v. Leffel* (1987) 196 Cal.App.3d 1310, 1318-1319.) However, the analysis is subject to a *Watson* prejudice analysis. (See *People v. Dobbins* (2005) 127 Cal.App.4th 176, 182-183 [failure to obtain a current probation report "implicates only California statutory law" and is therefore governed by the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].)

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[10] Section 1203, subdivision (b)(2)(E) provides: "The report shall be made available to the court and the prosecuting and defense attorneys at least five days, or upon request of the defendant or prosecuting attorney, nine days prior to the time fixed by the court for the hearing and determination of the report, and shall be filed with the clerk of the court as a record in the case at the time of the hearing. The time within which the report shall be made available and filed may be waived by written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court." Subdivision (b)(3) of section 1203 requires the court to consider the report at the sentencing hearing and make a statement on the record that it has done so.

Here, defendant cannot demonstrate prejudice. Although a new probation report containing the mitigating factors defendant alleges likely would have carried more credibility than defendant's own in-court testimony as to their existence, it is not reasonably likely the provision of a new report containing these factors would have affected the sentence. The factors defendant cites are not within the range of factors enumerated in the Rules of Court as mitigating factors.[11] Further, to the extent the court may consider "any other factor reasonably related to the sentencing decision" in imposing sentence (Cal. Rules of Ct., rule 4.420(b)) culled from sources other than the probation report,[12] defendant had the opportunity to inform the court of the mitigating facts; had the court believed such facts would have changed its mind in calculating defendant's sentence it could have taken the facts into account in pronouncing sentence, or ordered a new probation report to verify their existence and continued the matter. Therefore, there is nothing "to create a reasonable probability [the additional information would] affect the sentencing calculus favorably." (*People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1274.)

In addition, to the extent he argues the trial court relied on improper factors (his out of state felony convictions) in denying probation, defendant's argument lacks merit. A trial court has broad discretion to determine whether a defendant is suitable for probation (*People v. Welch* (1993) 5 Cal.4th 228, 233), and a defendant bears a heavy burden when

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[11] California Rules of Court, rule 4.423, subdivision (b) provides that mitigating factors relating to the defendant include: (1) The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes; (2) The defendant was suffering from a mental or physical condition that significant reduced culpability for the crime; (3) The defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process; (4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation; (5) the defendant made restitution to the victim; (6) the defendant's prior performance on probation or parole was satisfactory.

[12] California Rules of Court, rule 4.420(b) provides in part, "relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing."

attempting to show that the court has abused that discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) A court commits an abuse of discretion by denying probation when the court's determination is arbitrary, capricious, or beyond the bounds of reason. (See *People v. Warner* (1978) 20 Cal.3d 678, 683.) Moreover, a single aggravating factor may support the denial of probation (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615), and the court is presumed to have considered relevant criteria in the California Rules of Court pertaining to the grant or denial of probation absent a record affirmatively reflecting otherwise. (Cal. Rules of Court, rule 4.409.)

Here, contrary to defendant's assertions, the record does not support the conclusion it considered defendant's prior out-of-state felony convictions in denying probation. Further, although defendant was eligible for probation, we find no abuse of discretion in the trial court's refusal to grant probation. Pursuant to California Rules of Court, rule 4.414(a) and (b), the court had sufficient factors before it to deny probation: the degree of monetary loss (Cal. Rules of Court, rule 4.414(a)(5)); defendant's active participation in the crimes (Cal. Rules of Court, rule 4.414(a)(6)); the manner of committing the crimes demonstrated sophistication and professionalism (Cal. Rules of Court, rule 4.414(a)(8)), and the fact defendant took advantage of two positions of trust in committing the crimes (Cal. Rules of Court, rule 4.414(a)(9)). The record indicates the court considered potential mitigating factors as set forth in California Rules of Court, rule 4.414(b), including defendant's testimony concerning his disabled son and the adverse consequences of incarceration on his family. (Cal. Rules of Court, rule 4.414(b)(5).) We will not interfere with the trial court's exercise of discretion "when it has considered all facts bearing on the offense and the defendant to be sentenced." (*People v. Vargas* (1975) 53 Cal.App.3d 516, 533.)

DISPOSITION

The judgment of the superior court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.